

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2013 MSPB 50

Docket Nos. CH-0752-11-0867-I-1
CH-0752-11-0866-I-1

**Camille J. Vaughn,
Appellant,**

v.

**Department of the Treasury,
Agency.**

July 2, 2013

Camille J. Vaughn, Chicago, Illinois, pro se.

Joshua A. Dombrow, Esquire, Chicago, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision sustaining her 30-day suspension and removal. For the reasons given below, we DENY the petition for review.¹ We are issuing a precedential decision to explain how recent

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

changes in the law affect the notice of appeal rights that we provide to appellants who raise both discrimination and whistleblower claims in the context of an otherwise appealable action.

BACKGROUND

- ¶2 The appellant was a Supervisory Tax Examining Technician for the agency's Internal Revenue Service (IRS). *Vaughn v. Department of the Treasury*, MSPB Docket No. CH-0752-11-0866-I-1, Initial Appeal File (Suspension IAF), Tab 6, Subtab 4a. Effective April 22, 2011, the agency suspended the appellant from her position for 30 days based on four charges: Failure to Follow Managerial Instructions or Directions (five specifications); Inappropriate Behavior (three specifications); Failure to Follow Appropriate Leave Request Procedures (one specification); and Absence Without Leave (one specification). *Id.*, Subtabs 4b, 4h.
- ¶3 Effective September 9, 2011, the agency removed the appellant from her position based on three charges: Insubordination (four specifications); Failure to Follow Managerial Instructions (five specifications); and Inappropriate Behavior (three specifications). *Vaughn v. Department of the Treasury*, MSPB Docket No. CH-0752-11-0867-I-1, Initial Appeal File (Removal IAF), Tab 5, Subtabs 4b, 4d.
- ¶4 After the agency issued a final decision rejecting the appellant's equal employment opportunity (EEO) complaints of discrimination and retaliation, the appellant filed Board appeals challenging her suspension and removal. Removal IAF, Tab 1 at 4, Exhibit F. The appellant raised affirmative defenses of disability discrimination, retaliation for protected EEO activity, and reprisal for whistleblower activity. *Id.* at 5, 7, Exhibit G. She requested a hearing. *Id.* at 4.
- ¶5 After a hearing, the administrative judge issued an initial decision affirming the appellant's 30-day suspension and removal. Removal IAF, Tab 53, Initial Decision (ID) at 104. The administrative judge found that the agency proved its

charges by preponderant evidence,² ID at 13-64; that its actions promoted the efficiency of the service, ID at 97-98; and that the penalties of a 30-day suspension and removal were reasonable, ID at 98-104. The administrative judge also found that the appellant failed to prove her affirmative defenses. ID at 64-97.

¶6 The appellant has filed a petition for review. *Vaughn v. Department of the Treasury*, MSPB Docket No. CH-0752-11-0867-I-1, Petition for Review (PFR) File, Tab 1. The agency has filed an untimely response to the petition, along with a motion for the Board to accept its untimely response. PFR File, Tab 3. The appellant opposes the agency's motion. PFR File, Tab 4.

ANALYSIS

The agency's response to the petition for review

¶7 A response to a petition for review must be filed within 25 days after the date of service of the petition. [5 C.F.R. § 1201.114](#)(e). In this case, the certificate of service indicates that the appellant served her petition on the agency no later than September 10, 2012. PFR File, Tab 1. However, the agency did not file its response until November 8, 2012 – 31 days untimely. PFR File, Tab 3 at 1. The agency moves for the Board to waive the filing deadline on the basis that its representative did not receive the Clerk of the Board's letter acknowledging receipt of the petition for review until November 7, 2012, when he contacted the Board and obtained a copy of the letter via facsimile. *Id.*

¶8 For the following reasons, we DENY the agency's motion on the basis that it has not shown good cause to waive the filing deadline.

² The administrative judge did not sustain specification one of the Inappropriate Behavior charge in support of the appellant's removal, in which the agency alleged that the appellant raised her voice and made a comment to an employee that was perceived to be derogatory. ID at 55. The administrative judge sustained all of the remaining specifications and all of the charges. ID at 13-64.

See [5 C.F.R. § 1201.114](#)(g) (the Board will waive the filing deadline for a response to a petition for review for good cause shown). Although the Clerk of the Board customarily issues a letter to the parties acknowledging the receipt of a petition for review, this letter is not required by law, rule, or regulation. It is issued as a courtesy to the parties and to facilitate an orderly adjudication on review. Therefore, nonreceipt of such a letter does not, by itself, constitute good cause for an untimely filing.³ Cf. *McCurn v. Department of Defense*, [119 M.S.P.R. 226](#) (2013) (an agency's failure to provide notice of appeal rights as required by regulation constitutes good cause for an untimely appeal). Under the Board's regulations, the petition for review is the document that triggers the response filing period, [5 C.F.R. § 1201.114](#)(e), and the agency does not allege that it experienced any delay in receiving that document. Nor does the agency allege that its representatives were unaware of the regulatory filing deadline at issue in the absence of the letter that they were expecting. Because the agency did not attempt to determine the status of the petition for review for almost two months after receiving it, we find that it has not shown good cause for the filing delay, and we have not considered its response to the petition for review.

The appellant's petition for review

¶9 In her petition for review, the appellant does not specifically challenge the administrative judge's findings that the agency proved each charge by preponderant evidence. See generally PFR File, Tab 1; ID at 13-64. Instead, she generally asserts that the administrative judge "accepted statements by the agency that were untrue," PFR File, Tab 1 at 5, and that "[s]everal witnesses purjured [sic] themselves and falsified documents," *id.* at 4. The appellant does not offer

³ The Board may, however, consider this as a factor in its good cause determination. See *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980) (the Board will consider all the relevant facts and circumstances in deciding whether to waive one of its regulatory filing deadlines).

any evidence or argument to support these bare assertions of perjury and falsification of documents. Further, her assertion that the administrative judge accepted statements by the agency that were untrue constitutes mere disagreement with the administrative judge's well-reasoned findings and, as such, provides no basis for disturbing the initial decision. *See Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

¶10 The appellant also does not offer any specific argument on review challenging the administrative judge's findings that: she failed to prove her affirmative defenses; there is a nexus between the charges and the efficiency of the service; or a 30-day suspension and removal are reasonable penalties for the sustained misconduct. *See generally* PFR File, Tab 1; ID at 64-104. Based on our review of the record, we see no reason to disturb these findings.

¶11 Most of the appellant's arguments on review consist of challenges to the administrative judge's evidentiary and discovery rulings. In particular, the appellant alleges that the administrative judge improperly disallowed some of her exhibits and "nearly all" of her witnesses. PFR File, Tab 1 at 3.

¶12 An administrative judge has wide discretion to control the proceedings, including the authority to exclude testimony he believes would be irrelevant, immaterial, or unduly repetitious. *Sanders v. Social Security Administration*, [114 M.S.P.R. 487](#), ¶ 10 (2010). The Board has said that in order to "obtain reversal of an initial decision on the ground that the administrative judge abused his discretion in excluding evidence, the petitioning party must show on review that relevant evidence, which could have affected the outcome, was disallowed." *Jezouit v. Office of Personnel Management*, [97 M.S.P.R. 48](#), ¶ 12 (2004), *aff'd*, 121 F. App'x 865 (Fed. Cir. 2005).

¶13 The administrative judge approved 9 of the 34 witnesses the appellant requested. Removal IAF, Tab 29, Subtab M; Tab 34 at 17. He denied "the balance of the appellant's requested witnesses based on the appellant's inability to provide information showing they have relevant or material testimony to

provide concerning the agency's charges and specifications, or her affirmative defenses." Removal IAF, Tab 34 at 17. The appellant's vague assertion on review that the administrative judge erred in disallowing most of her witnesses does not show that their testimony would have been relevant, material, or not repetitious. PFR File, Tab 1 at 3. Therefore, she has not shown that the administrative judge abused his discretion in disallowing these witnesses. *See, e.g., Franco v. U.S. Postal Service*, [27 M.S.P.R. 322](#), 325 (1985).

¶14 With respect to the appellant's argument that the administrative judge improperly disallowed some of her exhibits, the appellant does not specify which of her exhibits were disallowed. PFR File, Tab 1 at 3. Our review of the record shows that the administrative judge issued an order dated August 30, 2012, granting the agency's motion to strike as untimely several exhibits that the appellant submitted after the hearing. Removal IAF, Tab 51. An administrative judge may refuse to consider any motion or other pleading that is not filed in a timely fashion. [5 C.F.R. § 1201.43](#)(c). Moreover, the appellant has not explained how the disallowed exhibits would affect the result reached in this appeal. Thus, she has not established that the administrative judge abused his broad discretion in excluding evidence or that any such error denigrated her substantive rights. *See Karapinka v. Department of Energy*, [6 M.S.P.R. 124](#), 127 (1981).

¶15 The appellant also argues on review that the administrative judge erred by not issuing subpoenas for documents she requested. PFR File, Tab 1 at 3. An administrative judge has broad discretion in ruling on discovery matters, and, absent a showing of abuse of discretion, the Board will not find reversible error in such rulings. *McCarthy v. International Boundary and Water Commission*, [116 M.S.P.R. 594](#), ¶ 15 (2011). Here, the appellant has neither shown that the administrative judge's alleged refusal to order subpoenas constituted an abuse of discretion nor that the alleged errors had an effect on the outcome of the appeal. PFR File, Tab 1 at 3; *see Karapinka*, 6 M.S.P.R. at 127.

¶16 The appellant also argues on review that the administrative judge improperly denied her motions for reasonable accommodation, representation, and expenses. PFR File, Tab 1 at 3. The appellant seems to be referring to a pleading she filed during the proceedings below, entitled “Motion to Request Reasonable Accommodation for Disabled Appellant.” Removal IAF, Tab 15. In that pleading, the appellant asserted that she suffers from disabilities which limit her ability to “prepare legal proceedings and represent herself” before the Board in her removal appeal. *Id.* at 3. The appellant requested “equal resources and representation in appealing [her] MSPB case, such as is provided for the [a]gency.” *Id.* In particular, she requested that the agency “assume the cost of hiring administrative and legal support . . . so that the [a]ppellant may have an equal opportunity to present her case before the Board.” *Id.*

¶17 As the administrative judge explained in denying the appellant’s motion, attorney fees are available to the appellant if she is a prevailing party in her appeals and payment of her attorney fees and costs is found to be in the interest of justice. Removal IAF, Tab 18 at 3-4. The Board has authority to request pro bono representation for an appellant in a disability retirement appeal who is found to be incompetent. *French v. Office of Personnel Management*, [37 M.S.P.R. 496](#), 499 (1988). It is well settled, however, that the Board’s authority to request pro bono representation for appellants claiming that they are mentally incompetent does not extend beyond retirement appeals in which appellants claim that they are mentally incompetent and present medical evidence to support such claims. *Marbrey v. Department of Justice*, [45 M.S.P.R. 72](#), 75 (1990). This is not a retirement appeal. We also note that, although the Board is obligated under the Rehabilitation Act to provide assistance to an appellant whose disability creates an impediment to her full participation in the appeals process, securing pro bono representation for such an appellant is not the kind of assistance contemplated by the Board’s rules implementing this obligation. *See* 5 C.F.R. part 1207. Thus, the administrative judge correctly denied the appellant’s motion.

¶18 The appellant also raises a claim of adjudicatory bias on review, alleging that the administrative judge “repeatedly showed bias in favor of the [a]gency.” PFR File, Tab 1 at 4. There is a presumption of honesty and integrity on the part of administrative judges that can only be overcome by a substantial showing of personal bias, and the Board will not infer bias based on an administrative judge’s case-related rulings. *Williams v. U.S. Postal Service*, [87 M.S.P.R. 313](#), ¶ 12 (2000). An administrative judge’s conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge’s comments or actions evidence a deep-seated favoritism or antagonism that would make fair judgment impossible. *Simpkins v. Office of Personnel Management*, [113 M.S.P.R. 411](#), ¶ 5 (2010).

¶19 In her petition for review, the appellant identifies no specific improper comments or actions by the administrative judge which indicated favoritism or antagonism. The appellant’s broad, general allegations of bias are not sufficient to rebut the presumption of the administrative judge’s honesty and integrity. *See Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 389 (1980).

Notice of Appeal Rights

¶20 Although the Board is not required to notify appellants of their appeal rights from a final Board decision, it is our custom to do so. We recognize that the appellate review process can be confusing, and we therefore attempt to make it more accessible by providing clear and accurate notice of those rights. To that end, we apply recent changes in the law to the instant appeal, in which the Board has issued a final decision deciding both whistleblower and discrimination claims in the context of an otherwise appealable action.

¶21 Cases within the Board’s jurisdiction that involve claims of discrimination under [5 U.S.C. § 7702](#)(a)(1)(B) are known as “mixed case appeals” and are governed by the procedures set forth at [5 U.S.C. § 7702](#). *Mills v. U.S. Postal Service*, [2013 MSPB 40](#), ¶ 7. Under [5 U.S.C. § 7703](#)(b)(2), judicial review of

mixed case appeals lies exclusively in federal district court of competent jurisdiction.⁴ *Id.*, ¶¶ 8-9 (citing *Doe v. Department of Justice*, No. 2012-3204, 2013 U.S. App. LEXIS 9095 (Fed. Cir. May 3, 2013) (nonprecedential)). On the other hand, cases that involve whistleblower claims,⁵ i.e., claims that the actions or decisions under appeal were based on the prohibited personnel practices described under [5 U.S.C. § 2302](#)(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D), “shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.” [5 U.S.C. § 7703](#)(b)(1)(B). Thus, [5 U.S.C. § 7703](#)(b) provides different paths of judicial review for final Board decisions involving covered discrimination claims and whistleblower claims. The instant appeal involves both. Removal IAF, Tab 34 at 8. Consistent with the plain language of the statute, *see Kloeckner v. Solis*, [133 S. Ct. 596](#), 603-04 (2012), we find that the appellant has the following three options to seek review of the Board’s decision.

¶22 If the appellant wishes to challenge the Board’s findings on her § 7702(a)(1)(B) discrimination claims alone, [5 U.S.C. § 7702](#)(b)(1) provides that she may petition the Equal Employment Opportunity Commission for review. The statute does not limit this right to administrative review based on any other claims that the appellant might have raised, although it does limit the scope of review to the discrimination issues.

⁴ If an appellant only wishes to challenge the Board’s findings on her discrimination claims, she also has the option of seeking administrative review by the Equal Employment Opportunity Commission. [5 U.S.C. § 7702](#)(b).

⁵ In this decision, any reference to a claim of “whistleblower” reprisal is also intended to cover a claim of retaliation for certain other protected activity under [5 U.S.C. § 2302](#)(b)(9) that is not whistleblowing per se, but that has been made subject to the procedures for seeking corrective action for whistleblower reprisal under a recent change in the law. *See* Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, §§ 101(b), 108(a), 126 Stat. 1465, 1466, 1469 (amending [5 U.S.C. §§ 1214](#), 1221, and 7703).

¶23 If the appellant wishes to challenge the Board's findings on her discrimination claims and any other matters in addition thereto, [5 U.S.C. § 7703](#)(b)(2) provides that she may file a civil action in the appropriate United States district court under the applicable anti-discrimination statute. At the district court, the appellant has the right to a trial de novo on her discrimination claims. [5 U.S.C. § 7703](#)(c)(3). The court has jurisdiction to review the other aspects of the Board's decision as well, including the merits of the underlying action and any whistleblower claims, under the deferential standard of [5 U.S.C. § 7703](#)(c). *Coons v. Department of the Treasury*, [383 F.3d 879](#), 888 (9th Cir. 2004); *Hayes v. Government Printing Office*, [684 F.2d 137](#), 138-41 (D.C. Cir. 1982). This is the most comprehensive path of review.

¶24 If, however, the appellant wishes to challenge the Board's decision on her whistleblower claim, to the exclusion of any discrimination claim or other alleged prohibited personnel practice described in [5 U.S.C. § 2302](#)(b), she has yet a third option for review under [5 U.S.C. § 7703](#)(b)(1)(B). That subparagraph provides, in relevant part, that

a petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.

[5 U.S.C. § 7703](#)(b)(1)(B). Under the plain language of the statute, an appellant who has raised claims of discrimination and whistleblower reprisal in the same Board appeal may drop her discrimination claims after the Board issues its final decision and seek review under this section based on her whistleblower and other non-discrimination claims alone. Although § 7702(b)(2) does not state that an appellant can transform a mixed case into a non-mixed case after the Board has issued a decision simply by not seeking judicial review on a discrimination claim,

Mills, [2013 MSPB 40](#), ¶ 9, section 7703(b)(1)(B) does – at least where an allegation of whistleblower reprisal is involved.

ORDER

¶25 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702](#)(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See [5 U.S.C. § 7703](#)(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. [42 U.S.C. § 2000e-5](#)(f) and [29 U.S.C. § 794a](#).

Other Claims: Judicial Review

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices described in [5 U.S.C. § 2302](#)(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United

States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.